No. 14,592

IN THE

United States Court of Appeals

For the Ninth Circuit

WALLACE HIGA, Administrator of the Estate of Takeichi Higa,
Appellant,

vs.

TRANSOCEAN AIRLINES, a corporation,
Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S PETITION FOR A REHEARING.

SHIRO KASHIWA,
307 Hawaiian Trust Building, Honolulu 13, T. H.,
Attorney for Appellant Wallace Higa, Administrator of the Estate of Takeichi Higa, Deceased.

On the Brief:
GENRO KASHIWA.

FILE
JAN -7 1956
PAUL P. O'BRIEN, CL

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Subject Index

Page

I. Preliminary statement 1

1. Transfers from the Civil Docket to the Admiralty Docket may be made 2

II. Conclusion 4

Table of Authorities Cited

Cases

Page

Cory Bros. & Co. v. U. S., 51 F.2d 1010, 1013 3

James Richardson & Sons v. Conners Marine Co., 141 F.2d 226, 229 3

Petrol Corporation v. Petroleum Heat and Power Co., 162 F.2d 327, 330 3

Pope and Talbot, Inc. v. Hawn, 74 S. Ct. 202, 206, 346 U.S. 406, 411 2

Prince Line v. American Paper Exports, 55 F.2d 1053 at 1056 3

The Silverpalm, 79 F.2d 598 (Cir. 9, 1935) 3

Codes

46 USCA, Section 763 2

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

I.

PRELIMINARY STATEMENT.

Having carefully considered the opinion of this Court, made and entered in this cause on December 15, 1955, we are convinced that this case is one in which a rehearing should be granted to the appellant for reasons to which we will presently refer.

The affirmance by this Court of the judgment of the court below affirms the following: "that the complaint herein be and it hereby is dismissed without prejudice

to the filing of an appropriate suit for damages in admiralty" (tr. 24). The death in this case took place on or about July 11, 1953 (tr. 5) and appellant will be faced with the defense of the two year statute of limitations as provided in the "Death on High Seas" Act. See 46 USCA section 763. The records of this court will show that this case was ready for argument on April 11, 1955 (date of appellee's brief) and a request for an early argument was made on June 27, 1955 by letter to Mr. Paul P. O'Brien, Clerk of this Court, stating full circumstances. The request was denied. See Exhibits A and B at end of this brief reciting said letters in full.

It is hereby requested that that portion of the last paragraph of the decision of this court be changed, reversing the dismissal by the court below, and mandating that, instead of a dismissal, this cause be transferred to the admiralty docket of the trial court. The authorities in support of this position follow:

1. TRANSFERS FROM THE CIVIL DOCKET TO THE ADMIRALTY DOCKET MAY BE MADE.

It is respectfully submitted that the "substantial rights of an injured person are not to be determined differently whether his case is labeled 'law side' or 'admiralty side' on a district court's docket." *Pope and Talbot, Inc. v. Hawn,* 74 S. Ct. 202, 206, 346 U.S. 406, 411. In the same decision the court pointed out that it will not allow the loss of substantial rights to "depend on which court house or *even on which side of the same court house,* a lawyer might guess to be in the best interest of his client" (emphasis supplied).

In *Prince Line v. American Paper Exports,* 55 F. 2d 1053 at 1056, the court stated:

> "When a cause of action is within the substantive jurisdiction of the District Court for any reason, it does not mar that jurisdiction that the suitor proceeds as libellant in the admiralty rather than as plaintiff at law."

And in *Cory Bros. & Co. v. U. S.,* 51 F.2d 1010, 1013, the court stated as follows:

> "But it by no means follows that a suit erroneously assumed to be under the Suits in Admiralty Act cannot be treated as one under the Tucker Act. The mistake results only in formal differences. The pleading has been called libel instead of a petition, and contains allegations of admiralty jurisdiction which are surplusage. So we hold that, if the court did not have jurisdiction in admiralty, jurisdiction existed under the Tucker Act and we pass to a consideration of the merits, namely, whether the libel states facts sufficient to constitute a good cause of action."

And in *Petrol Corporation v. Petroleum Heat and Power Co.,* 162 F.2d 327, 330, the court also stated:

> "We have fully recognized transfers from the admiralty docket to the civil docket."

See also *James Richardson & Sons v. Conners Marine Co.,* 141 F.2d 226, 229, where it was held:

> "For here all the facts showing diversity jurisdiction are presented, and it is well settled that under such circumstances an action shall be treated as within that jurisdiction where appropriate, even though it may have been commenced in admiralty."

And finally see *The Silverpalm,* 79 F.2d 598, a decision of this court where this court proceeded to hear in admiralty, a cause which was erroneously held to be a law case in the court below.

II.

CONCLUSION.

It is therefore submitted that substantial justice will be carried forth by this court's modification of the last paragraph of its decision ordering the lower court to transfer the cause from the law docket to the admiralty docket. Jury trial is hereby waived by appellant upon said modification. We, therefore, respectfully request that this court grant a rehearing.

Dated, Honolulu, Territory of Hawaii,
January 4, 1956.

Respectfully submitted,

WALLACE HIGA,
Administrator of the Estate of Takeichi Higa, deceased, Appellant.
By SHIRO KASHIWA,
His Attorney.

GENRO KASHIWA,
Of Counsel.

Certificate of Counsel

I hereby certify that I am of counsel for appellant and petitioner in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Honolulu, Territory of Hawaii,
January 4, 1956.

Shiro Kashiwa,
Of Counsel for Appellant and Petitioner.

(Exhibits "A" and "B" Follow.)

Exhibits.

EXHIBIT "A"

Kashiwa and Kashiwa
Attorneys at Law
Hawaiian Trust Building
Honolulu 13, Hawaii

Shiro Kashiwa
Genro Kashiwa

Phone: 57109
Telegraphic Address:
"Kashlaw Honolulu"

June 27, 1955

Mr. Paul P. O'Brien
Clerk, U. S. Court of Appeals
For the Ninth Circuit
San Francisco 1, California

Re: No. 14592
Higa vs. Transocean

Dear Sir:

I have not heard anything from you regarding argument in the above mentioned case.

The airplane involved in the case fell in the waters off Wake Island on July 11, 1953. It happens that July 11, 1955 will be two years within which we must file an admiralty suit if our appeal is denied. I am wondering whether it would be possible to have argument in the above case set sometime during the early part of July.

Yours very truly,
/s/ SHIRO KASHIWA
Shiro Kashiwa

SK:ao

P.S. Please wire "Kashlaw Honolulu" collect for answer.

EXHIBIT "B"

Office of the Clerk
U. S. Court of Appeals
For the Ninth Circuit
San Francisco 1, Calif.

June 29, 1955

Shiro Kashiwa, Esq.
Attorney at Law
Hawaiian Trust Bldg.
Honolulu 13, Hawaii

Re: No. 14592
Higa vs. Transocean

Dear Mr. Kashiwa:

I have your favor dated the 27th instant, concerning the assignment of the above cause for hearing.

As you know our Court has been somewhat behind in the calendaring of its cases and it is quite likely the above cause will be calendared for hearing sometime during the month of September or October.

I shall advise you of the definite date of hearing later.

Sincerely yours,
/s/ PAUL P. O'BRIEN,
Paul P. O'Brien,
Clerk.

O'B:m